2154.

SUPREME COURT OF THE UNITED STATES.

No. 186.

JOHN HENSHAW, PLAINTIFF,

vs.

JOHN R. MILLER, EXECUTOR OF CHARLES E. MILLER, DECEASED.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT U. S., FOR THE EASTERN DISTRICT OF VIRGINIA.

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GIDEON, print.

2155.

In the court of the United States for the fourth circuit and eastern district of Virginia.

JOHN HENSHAW, a citizen and inhabitant of the State of Massachusetts, plaintiff,
vs.
CHARLES E. MILLER, a citizen of Virginia, defendant.
} In case.

Declaration.

John Henshaw, a citizen and inhabitant of the city of Boston, in the State of Massachusetts, complains of Charles E. Miller, a citizen of the State of Virginia, being in custody, &c., of a plea of trespass on the case; and thereupon the said plaintiff saith that he, the said plaintiff, before and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, was, and from thence hitherto hath been and still is, a druggist, and the trade and business of a druggist hath for and during that time used, exercised, and carried on, and doth still use, exercise, and carry on, at the said city of Boston, in the State of Massachusetts; and the said defendant, before the time of committing of the grievance by the said defendant hereinafter mentioned, was a druggist, and the trade and business of a druggist had used, exercised, and carried on, at the said city of Richmond, in the State of Virginia; and the said defendant, before the time of the committing of the grievance by the said defendant as hereinafter mentioned, had dealt with and was trusted by the said plaintiff for divers goods, wares, and merchandise on credit, in the way of the said trade and business, and at the time of the committing of the grievance by the said defendant as hereinafter mentioned, one Porter Robinson was using, exercising, and carrying on the trade and business of a druggist in the same house and place in which, before that time, the said defendant with one J. R. Miller, under the firm and style of C. E. & J. R. Miller, had used, exercised, and carried on the said trade and business, and the said Porter Robinson was desirious to deal with and be trusted by the said plaintiff from time to time for divers goods, wares, and merchandise on credit, in the way of the said trade and business, and therefore the said defendant, heretofore, to wit, on the tenth day of January, in the year 1837, at Richmond aforesaid, in the State aforesaid, contriving and intending to deceive and defraud the said plaintiff, and wrongfully, deceitfully, and fraudulently to induce, persuade, and encourage the said plaintiff to deal with the said Porter Robinson in the way of his trade and business, and to sell and to deliver to the said Porter Robinson, from time to time, divers goods, wares, and merchandise, upon trust and credit, wrongfully, deceitfully, and fraudulently,

then and there in writing represented and affirmed to the said plaintiff in substance that they, the said C. E. & J. R. Miller, had sold their establishment to Mr. Porter Robinson, a young gentleman of the best standing and adequate means, and whom they, the said C. E. & J. R. Miller, could with confidence recommend; that he, the said Porter Robinson, would send to the said plaintiff an order soon; thereby then and there wrongfully, deceitfully, wilfully, and fraudulently, conveying to the plaintiff this meaning, that the said Porter Robinson had bought and paid for, and was the owner, of the entire stock of goods, wares, and merchandise of the said C. E. & J. R. Miller, and was fit to be trusted with goods on credit; and the said plaintiff saith, that from time to time, after the said representation and affirmation, to wit, until the day of , the said Porter Robinson applied to the said plaintiff for goods to be sold to him, the said Porter Robinson, on credit, in the way of the said plaintiff's trade and business as a druggist; and the said plaintiff, being unacquainted with the circumstances of the said Porter Robinson, except through the said representation and affirmation of the said defendant, living at a distance from the said Porter Robinson's place of residence, and not knowing any thing to the contrary of the said representation and affirmation, but confiding in and giving credit to the same, and believing therefrom that the said Porter Robinson had a capital equal to the value of the said stock of goods, wares, and merchandise, and was fit to be trusted with goods on credit, afterwards, to wit, on the 10th day of January, in the year 1837, at the said city of Boston, in the State of Massachusetts, and at divers other days and times between that day and the day of , was, by means and in consequence of the said representation and affirmation, induced to give credit to the said Porter Robinson, and did in consequence of the said representation and affirmation sell and deliver to him divers goods on a credit to a large amount, to wit, to the amount of three thousand dollars, whereas in truth and in fact the said Porter Robinson, at the time of the said representation and affirmation, had not paid the said defendant or the said firm of C. E. & J. R. Miller for the said stock, but then stood indebted to them for the same in a large sum of money, to wit, in the sum of two thousand and one hundred dollars; and it had been understood and agreed between the said Porter Robinson and the defendant, before the time of the said representation and affirmation, that the said Porter Robinson should give a lien on the said stock for the purpose of securing the payment of the said large sum of money, and whereas in truth and in fact the said Porter Robinson, at the time of the said representation and affirmation, was not fit to be trusted by the said plaintiff with goods on credit, and the said defendant knew at the time that he was not. And the said plaintiff further saith, that the sums of money for which the goods were sold and delivered as aforesaid by the plaintiff to the said Porter Robinson are still wholly due and unpaid to the said plaintiff; that after making the said representation and affirmation, to wit, on the 14th day of February, in the year 1837, the

said defendant and his said partner, J. R. Miller, procured a deed to be executed by the said Porter Robinson to one Silas Wyatt, as trustee for the said defendant and the said J. R. Miller, for the purpose of securing to them the payment of the said large sum of money in which the said Porter Robinson stood indebted to them, by which deed there was conveyed all the said Robinson's stock of medicines, paints, oils, &c., then in his store on the main street in the city of Richmond, and which was known as an apothecary store, and kept by the said Porter Robinson; that subsequently, to wit, on the day of , the said defendant, with his said partner, J. R. Miller, sold, or caused to be sold, the whole stock on which the said deed was given, or so much thereof as remained at the time of sale, and the whole proceeds thereof were applied towards the payment of the said large sum of money in which the said Porter Robinson stood indebted to them; that the said Porter Robinson is wholly insolvent, and the said plaintiff is wholly unable to obtain from him payment of the money which remains due and unpaid to the said plaintiff for the goods sold and delivered as aforesaid, to wit, at the city of Richmond, in the State of Virginia, aforesaid; and the said plaintiff, before and at the time of the committing of the grievance by the said defendant, late partner with one J. R. Miller, trading under the style of C. E. & J. R. Miller, as hereinafter in this count mentioned, and from thence hitherto hath been, and still is, a druggist, and the trade and business of a druggist hath for and during all the time used, exercised, and carried on, and still doth use, exercise, and carry on at Boston, in the State of Massachusetts; and the defendant, before the committing of the said grievance hereinafter mentioned, had been a druggist, and the trade and business of druggist had used, exercised, and carried on at Richmond, in the State of Virginia, as one of the firm of C. E. & J. R. Miller; and the said defendant, before the committing of the said grievance hereinafter mentioned, had sold to one Porter Robinson all the stock in trade which they the defendant and J. R. Miller had as druggists in the said city of Richmond, in the State of Virginia, and the said Porter Robinson, in consequence of his purchase of the said stock, had, before the committing of the said grievance by the said defendant, become indebted to the defendant and the said J. R. Miller, as partners, and at the time of the committing of the said grievance was still indebted to the defendant and J. R. Miller in a large sum of money, to wit, in the sum of $2,100; and before the committing of the said grievance by the said defendant, as hereinafter mentioned, it had been understood and agreed between the said Porter Robinson and the said defendants, that he, the said Porter Robinson, for the purpose of securing the payment of the said large sum of money, would thereafter execute a mortgage or deed of trust or other lien on the stock in trade which he might have at the time of executing the same, and the said Porter Robinson after the said sale to him by the defendant and J. R. Miller was desirous to deal with and to be trusted by the said plaintiff from time to time for divers goods, wares, and merchandise, on credit, in the way of his trade and

business; and thereupon the said defendant, heretofore, to wit, on the 10th day of January, in the year 1837, at the said city of Richmond, in the State of Virginia, again contriving and intending to deceive and defraud the said plaintiff, and wrongfully, deceitfully, and fraudulently to induce, persuade, and encourage, the said plaintiff to deal with the said Porter Robinson in the way of his trade and business, and to sell and deliver to the said Porter Robinson divers goods, wares, and merchandise, upon trust and credit, then and there, wilfully, wrongfully, deceitfully, and fraudulently, in writing, signed by the said defendant with the name and style of C. E. & J. R. Miller, represented to the plaintiff by the name of John Henshaw, esq., that they, the defendant and J. R. Miller, had sold their establishment to Mr. Porter Robinson, a young gentleman of the best standing and adequate means, and whom they, meaning the said defendant and J. R. Miller, could with confidence recommend, that he, the said Porter Robinson, would send him, the said plaintiff, an order soon; and the said defendant then and there well knowing that the said Porter Robinson was indebted to the said firm of C. E. & J. R. Miller, in consequence of the said purchase of the said stock in a large sum of money, to wit, the sum of $2,100, and that it had been understood and agreed that a mortgage or deed of trust or other lien should be given as aforesaid, then and there, although it was material that the said plaintiff should be informed of the same, wilfully, wrongfully, deceitfully, and fraudulently withheld, suppressed, and concealed from the plaintiff the fact that the said Porter Robinson stood indebted to them, the defendant and J. R. Miller, as partners in the said large sum of money, and wilfully, wrongfully, deceitfully, and fraudulently withheld, suppressed, and concealed from the plaintiff the fact that the said Porter Robinson was to execute a mortgage or deed of trust or other lien on the stock as aforesaid, for the purpose of securing to them, the said C. E. & J. R. Miller, the payment of the said large sum of money, and wilfully, wrongfully, deceitfully, and fraudulently withheld, suppressed, and concealed from the plaintiff that the said Porter Robinson was indebted to them, the said C. E. & J. R. Miller, in any sum of money, or was to execute any mortgage, deed of trust or lien whatever, for the purpose of securing any sum of money to them, the said C. E. & J. R. Miller.

And the said plaintiff saith that the said Porter Robinson then and there applied to the said plaintiff to deal with him in the way of the said plaintiff's trade and business, and then and there, and at divers other times, applied to the said plaintiff to be trusted by the said plaintiff for divers goods, wares, and merchandise, on credit, in the way of the said trade and business, and the said plaintiff carrying on his business at a distance from the said Porter Robinson, and having no knowledge of his circumstances, except that derived from the said representation of the defendants, supposing that the information given to him by the defendant was a fair representation of what the said defendant knew concerning the circumstances of the said Porter Robinson, that the said defendant had stated nothing which was false, and suppressed

nothing which he ought to have disclosed; and believing from the said representation that the said Porter Robinson was a trustworthy person, did, in consequence of the said representation so made by the defendant, and of the said defendant withholding, suppressing, and concealing the material facts herein before in this count mentioned, afterwards, to wit, on the day and year last aforesaid, and for a long time, to wit, on divers other days and times between the day last aforesaid and the day of , at Boston, in the State of Massachusetts, deal with the said Porter Robinson in the way of his trade and business, and give credit to the said Porter Robinson and sell and deliver to him divers other goods on credit to a large amount, to wit, to the amount of $2,033 79. And the said plaintiff further says, that the said Porter Robinson hath not, nor hath any other person on his behalf, paid to the plaintiff the said last mentioned sum of money so due to him for the said last mentioned goods or any part thereof; but, on the contrary thereof, since the said representation so made by the defendants, to wit, on the 14th day of February, in the year one thousand eight hundred and thirty-seven, a deed was made by the said Porter Robinson to one Silas Wyatt, conveying all the said Robinson's stock of medicines, paints, oils, &c., which he had at that time in his store on the main street in the city of Richmond, and which was known as an apothecary store and kept by the said Porter Robinson, in trust for the purpose of securing to the defendant and the said J. R. Miller, his partner, the payment of the said large sum of money which was due from the said Porter Robinson to the defendant and J. R. Miller; and after the said deed was made, to wit, on the day of , the said stock of medicines, paints, and oils so conveyed, or so much thereof as then remained, together with the said goods, medicines, and drugs, which had before that time been sold and delivered to the said Robinson by the said plaintiff upon the said representation of the said defendant, was sold, and the proceeds thereof applied to pay or towards the payment of the said large sum of money due from the said Porter Robinson to the defendant and J. R. Miller; and the said Porter Robinson is now insolvent, and was at the time of the said representation an infant, and the plaintiff in consequence thereof is wholly unable to obtain from him payment of the said sum of money so due to him for the said last mentioned goods or any part thereof, to wit, at the said city of Richmond, in the State of Virginia aforesaid.

Whereupon the plaintiff saith, that he is injured and hath sustained damage to the amount of $5,000. And therefore he brings suit, &c.

MAYO, *P. Q.*

May term, 1839, June 5th.

JOHN HENSHAW, plaintiff,
against
CHARLES E. MILLER, defendant. } In case.

This day came the parties, by their attorneys, and the defendant by

his counsel filed his plea of "not guilty," and the plaintiff his replication thereto, &c.

May term, 1851, May 28th.

JOHN HENSHAW, plaintiff,
against
CHARLES E. MILLER, defendant. } In case.

The defendant, Charles E. Miller, being dead, on the motion of the plaintiff, by his attorney, a writ of scire facias is awarded him to revive this suit against John R. Miller, the executor of the last will and testament of the said defendant, returnable to the next term.

Scire facias.

[SEAL.] The President of the United States of America, to the marshal of the eastern district of Virginia, greeting:

Whereas in a certain action of trespass on the case lately depending in the court of the United States for the fourth circuit and eastern district of Virginia, between John Henshaw, a citizen of the State of Massachusetts, plaintiff, and Charles E. Miller, a citizen of the State of Virginia, residing in the eastern district thereof, defendant:

But before any verdict was given, or judgment entered therein, the said Charles E. Miller departed this life, having first made his last will and testament in writing, and thereof appointed John R. Miller, executor, who has proved the same and taken upon himself the burden and execution of said will, and the said John Henshaw has applied for a proper remedy in this behalf, and being willing that right and justice may be done agreeable to the acts of Congress of the United States in such case made and provided, command you, that you make known according to law to the said John R. Miller, executor of the last will and testament of the said Charles E. Miller, deceased, that he be before the judges of the court of the United States for the fourth circuit and eastern district of Virginia, in the city of Richmond, on the 25th day of November next, to show if any thing for the said Charles E. Miller, deceased, or for himself, he can say why the said action of trespass on the case, and the proceedings therein had, should not stand and be revived against the said John R. Miller, executor as aforesaid, and be in all things in the same plight and condition as it was at the time of the decease of the said Charles E. Miller, and further to do and receive what the said court shall in that part consider. And have then there this writ.

Witness R. B. Taney, chief justice of the Supreme Court of the United States, at Richmond, this ninth day of August, 1851, and in the 76th year of the independence of the United States of America.

P. MAYO,
Clerk.

Return on sci. fa.

Executed 8th Sept., 1851, by leaving at his place of residence with Mrs. Louisa P. Miller, his wife, a true copy of the within.

RO. WALKER, *D. M.*,
For THOS. S. HALL, *M. E. V. D.*

November term, 1851, Dec. 18th.

JOHN HENSHAW, plaintiff,
against
CHARLES E. MILLER'S ex'r, defendant. } In case.

This day came the defendant, by his counsel, and moved the court to quash the scire facias awarded in this cause, and the court takes time to consider of its judgment.

December 22d.

JOHN HENSHAW, plaintiff,
against
CHARLES E. MILLER'S ex'or, defendant. } On motion to quash sci. fa.

The motion to quash the scire facias is ordered to be continued until the next term.

May term, 1852.

JOHN HENSHAW, plaintiff,
against
CHARLES E. MILLER'S ex'or, defendant. } On motion to quash sci. fa.

The motion to quash is ordered to be continued.

November term, 1852.

The motion to quash is ordered to be continued.

May term, 1853, May 26th.

JOHN HENSHAW, plaintiff,
against
CHARLES E. MILLER'S ex'or, defendant. } On motion to quash sci. fa.

Upon the argument of the motion to quash the scire facias in this case, a question occurred, whether this action survived against the executor of the defendant, or abated by the defendant's death.

And the opinion of the judges being opposed on this point, it is thereupon, at the request of the counsel for the defendant, ordered by the court that it be certified under the seal of this court to the Supreme Court at the next session.

CLERK'S OFFICE, UNITED STATES COURT,
Fourth circuit and eastern district of Virginia, sct:

I, P. Mayo, clerk of the United States court for the fourth circuit and eastern district of Virginia, do hereby certify that the foregoing is a